ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON)

FILED
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CLERK OF COURT
LEXINGTON, SC

James Spencer, individually and on behalf of the Estate of Doris Holt and on behalf of Southern Holdings, Inc.;

Plaintiffs,

v.

John R. Rakowsky; Adrian L. Falgione; and The Law Offices of Adrian Falgione, LLC;

Defendants.

C/A No. 2012-CP-~~40~~-32-3428

ORDER OF DISMISSAL

THIS MATTER came before the undersigned by way of Motions to Dismiss filed by John R. Rakwosky ("Rakowsky") and by Defendants Adrian L Falgione and The Law Offices of Adrian L. Falgione, LLC (collectively, "Falgione Defendants") in November of 2011.[1] At a hearing on June 5, 2013, in Laurens, South Carolina, the Plaintiffs appeared *pro se*, Amanda K. Dudgeon, Esquire, appeared on behalf of Rakowsky, and Benjamin C. Bruner, Esquire, appeared on behalf of the Falgione Defendants. The parties consented on the record to allow the undersigned to hear this matter pending issuance of an order granting this Judge jurisdiction. That order was issued on June 27, 2013, *nunc pro tunc* June 5, 2013. After careful consideration of the allegations in the complaint and the arguments of the parties at the hearing,[2] I find the Defendants' Motions to Dismiss shall be granted for the reasons set forth below.

[1] The Falgione Defendants later amended their motion on January 3, 2013 to challenge timeliness and sufficiency of service.

[2] Plaintiff and others contacted the court via email on several occasions after the hearing was concluded and interposed additional arguments which do not relate to the merits of the narrow issue before the court. Although the court is extremely sympathetic with the assertions of Plaintiff and others that they were not treated fairly by the Federal Court in the Underlying Case, this court is constrained to follow the law as written.

EXHIBIT
A
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emphatically and vigorously refused to settle. Instead, the Plaintiffs told Rakowsky and Falgione they would object when the judge polled them about the settlement.

On the following day, May 9, 2007, when the trial was scheduled to begin, the Plaintiffs and their attorneys, the Defendants in this action, appeared in Court. After a conference in chambers, a hearing was held in which the attorneys placed the terms of the settlement on the record, allegedly against the Plaintiffs' wishes. The Court accepted the settlement and dismissed the jury pool. According to the complaint, the Court did not poll the Plaintiffs. The Plaintiffs further allege they were told the settlement was not final until a settlement agreement was signed.

In late May 2007, the Plaintiffs in the Underlying Case began inundating the Court with letters "pointing out inconsistencies in Rakowsky's letters, the transcript of the [pretrial] evidentiary hearing, and why the Judge made the evidentiary rulings he did, as reported by Rakowsky and Falgione behind closed doors." (Compl. ¶ 54.) The Court construed the letters as motions to set aside the settlement, and on July 3, 2007, issued an Order denying the motions.

More than three years later, on August 15, 2011, the Plaintiffs filed this *pro se* malpractice suit against Rakowsky and Falgione. No expert affidavit was filed with the complaint or within 45 days after, nor did the Plaintiffs request an extension to file an expert affidavit in support of their legal malpractice claims.

DISCUSSION

I. Failure to File Expert Affidavit

The Defendants first argue dismissal is proper because the Plaintiffs failed to timely file an expert affidavit pursuant to S.C. Code § 15-36-100. I agree.

In South Carolina, a plaintiff in a legal malpractice action is required to file an expert affidavit as part of his complaint. S.C. Code §§ 15-36-100(B), (G)(2). This requirement protects professionals licensed by the State of South Carolina from frivolous claims. *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010) ("[G]enerally, a plaintiff in a legal malpractice action must establish this standard of care by expert testimony."); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996) (same). While an exception to the contemporaneous filing requirement exists when the statute of limitations will expire within ten days of filing the complaint, the plaintiff must nevertheless supplement the complaint with an expert affidavit within forty-five days of the date of filing. S.C. Code § 15-36-100(C)(1). If the plaintiff fails to file an expert affidavit within the specified period, "the complaint is subject to dismissal for failure to state a claim." *Id.*

There can be little doubt that the expert affidavit requirement applies to this action. The Plaintiffs acknowledge as much in Paragraph 7 of the complaint, which purports to be filed "pursuant to S.C. Code § 15-36-100(c)(1). . . ." Since the Complaint alleges the statute of limitations was about to expire, § 15-36-100(C)(1) required the Plaintiffs to file an expert affidavit no later than September 29, 2011, forty-five days after the Complaint was filed.

At the hearing, Spencer argued no expert affidavit is required because the Defendants have admitted malpractice. However, the record does not support Spencer's argument. Likewise, the common knowledge exception clearly does not apply in this case. Furthermore, I find the nature of the allegations the Plaintiffs have made against the Defendants requires expert testimony to establish the applicable standard of care. *Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745.

STANDARD

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." *Doe*, 373 S.C. at 395; 645 S.E.2d at 247. Conversely, if the complaint fails to state facts sufficient to constitute a cause of action, then dismissal is proper under Rule 12(b)(6), SCRCP.

FACTUAL/PROCEDURAL BACKGROUND

This is a legal malpractice action that arises out of a case in which Rakowsky and Falgione represented the Plaintiffs. The underlying case was filed in federal court for the District of South Carolina, Florence Division, and assigned Civil Action No.: 4:02-cv-1859-RBH ("Underlying Case"). The complaint in the Underlying Case was filed in May 2002 (by two attorneys not defendants to this case) and included allegations against the Plaintiffs' former business partners, the Horry County Sherriff's Department, and the Myrtle Beach Police Department, as well as various officials, deputies, and officers in those agencies, all of whom took some part in an alleged attempt to take over Southern Holdings, Inc.

Plaintiffs allege that on May 8, 2007, the day before trial, the Court conducted a pretrial hearing, at which it heard arguments on evidentiary motions. After the hearing, the presiding judge held a conference in chambers with the attorneys. According to the complaint, Rakowsky and Falgione told the Plaintiffs certain evidence had been excluded and then attempted to coerce the Plaintiffs to accept a settlement offer for $55,000. Plaintiffs allege, however, that they

The record does contain an affidavit filed by the Plaintiffs on April 16, 2013 from Aimee Zmroczek, a purported expert. However, that affidavit was filed more than 600 days after the complaint, well beyond the time allowed by S.C. Code §15-36-100(C)(1).

Accordingly, I find the Plaintiffs failed to comply with S.C. Code §15-36-100 and, therefore, that their claims against the Defendants should be dismissed.

II. Statute of Limitations

In addition, the Defendants argue dismissal is proper under Rule 12(b)(6), SCRCP, because the Plaintiffs failed to commence their action within the three-year statute of limitations. I agree.

"The statute of limitations in a legal malpractice case is three years." S.C. Code § 15-3-530; *Kimmer v. Wright*, 396 S.C. 53, 57-58, 719 S.E.2d 265, 268 (Ct. App. 2011), *reh'g denied* (Dec. 19, 2011). "Under the discovery rule, the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Id.* (internal quotations omitted). In *Epstein v. Brown,* 363 S.C. 372, 610 S.E.2d 816 (2005), the Supreme Court explained that reasonable diligence means,

> an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.**

363 S.C. at 376, 610 S.E.2d at 818 (emphasis in original). Applying that understanding of the discovery rule to the facts of this case, it is apparent the Plaintiffs failed to commence their action within the statute of limitations.

In the complaint, the Plaintiffs allege various acts of misconduct by Rakowsky and Falgione that culminated in the May 9, 2007 settlement. Most importantly, the Plaintiffs allege they emphatically and vigorously told the Defendants they refused to settle the case. The Plaintiffs were present in the courtroom on May 9, 2007, and witnessed their attorneys settle their case on the record. That fact cannot be overlooked. If, as they allege, the Plaintiffs emphatically refused to settle and intended to state their objections on the record, then there is little doubt they knew they had suffered an actionable injury when they left the courthouse that day.

Although the Plaintiffs contend they were told the settlement was not final at that time, the only inference from their letters to the Federal Judge, who construed the letters as motions to set aside the settlement, is the finality of the settlement had set in. At the latest, therefore, the three-year clock began to run when Judge Harwell issued his July 3, 2007 order. The complaint in this action, filed August 15, 2011, is well beyond the three-year statute.

Accordingly, the Defendants' motions should be granted and the claims against them dismissed.

IT IS THEREFORE ORDERED that the Motions to Dismiss filed by Rakowsky and by the Falgione Defendants are hereby granted for the reasons set forth above. IT IS FURTHER ORDERED that the complaint shall be and hereby is dismissed with prejudice.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Presiding Judge, Eleventh Judicial Circuit

August 19, 2013
Greenwood, South Carolina